

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

NATASHA M. THOMAS,)	
Appellant,)	
)	
v.)	Vet. App. No. 17-4408
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**APPELLANT’S APPLICATION FOR AWARD OF
REASONABLE ATTORNEY’S FEES AND OTHER EXPENSES
PURSUANT TO 28 U.S.C. §2412(d)**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 and U.S. Vet. App. R. 39, Appellant Natasha M. Thomas, by and through counsel, hereby submits this application for an award of reasonable attorney’s fees and other expenses in the amount of \$8,933.91.

Procedural History

This submission is made within thirty (30) days following the Court’s Mandate and is thereby filed timely. 28 U.S.C. § 2412(d)(1)(B); *Bazalo v. Brown*, 9 Vet. App. 304 (1996).

The Appellant is seeking entitlement to a compensable rating for left knee anterior cruciate ligament tear status post repair with residual scarring.¹ Record (R.) at 1-16. The Board of Veterans’ Appeals (Board) denied Appellant’s claims in an October 23, 2017 decision and the Appellant then timely appealed to this Honorable Court. In addition,

¹ Appellant had also sought entitlement to an effective date earlier than September 17, 2001, for the award of a combined 30 percent rating for left knee retropatellar pain syndrome but this was not argued at Court and was dismissed. *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

the Board granted an effective date of April 19, 2012 for the award of an increased, 10 percent rating for right knee genu recurvatum. *Id.* Accordingly, this issue is not before the Court and should be left undisturbed. *Sheets v. Nicholson*, 20 Vet.App. 463, 466-67 (2006).

After the case was fully briefed and oral argument ordered by the Court, the parties entered into a joint motion for partial remand that was subsequently ordered by the Court.

ARGUMENT

I. THE APPELLANT IS A PREVAILING PARTY AND IS ELIGIBLE TO RECEIVE AN AWARD.

In order to be eligible for fees under EAJA, the Appellant must have achieved “prevailing party” status pursuant to 28 U.S.C. § 2412(d)(1)(A); *Cuycholl v. Principi*, 15 Vet. App. 355, 357 (2001)(citing *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001)(en banc); *Buckhannon Board & Care Home v. W.V. Dep’t of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 1839-40, 149 L. Ed.2d 855 (2001)(defining “prevailing party” in certain fee-shifting statutes as requiring a “judicially sanctioned change in the legal relationship of the parties” and reiterated that a party is required to “receive at least some relief on the merits of the claim”). This Court has further held that “a remand does not constitute ‘some relief on the merits’ unless that remand is predicated upon administrative error.” *Sumner v. Principi*, 15 Vet. App. 256, 265 (2001).

In the instant matter, the parties agreed that the Board erred when it failed to ensure that VA fulfilled its duty to assist by providing an adequate medical examination.

Specifically, Appellant has three surgical scars related to her service-connected left retropatellar pain syndrome that she has reported to be painful; however, the VA medical examiners failed to make any findings as to the size or painfulness of Appellant's arthroscopic scars despite a finding by the Board that she was competent to report that her scars were painful or numb. R. at 8. Consequently, Appellant is a prevailing party and is entitled to an award of fees and costs under EAJA.

Further, Appellant is eligible to receive an award as Appellant's net worth did not exceed \$2,000,000 (two million dollars) at the time the action was filed in November 2017; See 28 U.S.C. § 2412(d)(2)(B); see also *Bazalo*, 9 Vet. App. at 309, 311.

II. THE POSITION OF THE DEPARTMENT OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

Appellant is eligible to receive an award because the VA's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(B); see *Stillwell v Brown*, 6 Vet. App. 291, 302 (1994). The Secretary has the burden of proving that its position was substantially justified both at the adjudication stage (BVA adjudication) as well as in the litigation stage. See *Locher v. Brown*, 9 Vet. App. 535, 537 (1996).

The Board is required to base its decision on all evidence and material of record and to consider all applicable provisions of law and regulation. See 38 U.S.C. § 7104(a). Appellant contends that the Secretary's position was not substantially justified at the adjudication stage because VA failed to ensure that its duty to assist had been satisfied in terms of providing medical examination when necessary to make a decision on the claim.

See 38 U.S.C. §5103A(a)(1), (d)(1). Consequently, a remand is necessary to correct that error.

No special circumstances exist which would make the award of attorney's fees unjust. 28 U.S.C. § 2412(d)(1)(A).

III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

An itemized statement of legal services rendered and expenses incurred for which the Appellant seeks compensation are set forth in the declarations attached as Exhibits A and B.

Attorney's fees were charged for representation before this honorable Court and include fees related to the preparation and submission of this application. Under 28 U.S.C. § 2412(d)(2)(A), the applicable rate is \$125.00 per hour for appeals filed after March 29, 1996. In determining the lead counsel's statutory hourly rate, the applicable rate of \$125.00 per hour was subsequently adjusted to reflect the rate of inflation based upon the U.S. Department of Labor's Consumer Price Index (CPI) for the local area (Detroit MI). See *Mannino v. West*, 12 Vet. App. 242 (1999).² Applying the 52.7 percent CPI rate increase to the statutory hourly rate of \$125 provides for an adjusted rate of \$190.88 per hour. See *Elczyn v. Brown*, 7 Vet. App. 170 (1994). The fees claimed for Appellant's lead counsel was then calculated by multiplying the \$190.88 per hour inflation adjusted rate by the total number of hours spent working on this appeal.

² The percentage increase was calculated by subtracting the local (Detroit MI) index of the second quarter of 1996 (using April 1996 figure of 152.3) from that of February 2019 (figure of 232.549) that represented the index closest to the midpoint of this action. The difference was then divided by the index of the first date: $232.549 - 152.3 = 80.249$; $80.249/152.3 = 0.527$ or 52.7 % increase.

Appellant seeks reimbursement for legal fees incurred for representation before the Court. Appellant's lead counsel expended 33 hours at an hourly rate of \$190.88, which yielded a fee of \$6,299.04. See Exhibit A. Appellant's co-counsel expended 4.97 hours at an hourly rate of 199.71, which resulted in legal fees of \$991.88. See Exhibit B. In addition, Appellant's co-counsel was assisted by a paralegal who worked for seven hours at an hourly rate of \$150 per hour, which amounted to \$1,050 in fees. Id. Consequently, the combined legal fees for Appellant's lead counsel and co-counsel amount to \$7,290.92. Fees sought for a paralegal's assistance amount to \$1,050. Further, Appellant seeks reimbursement for costs of \$592.99 related to the prosecution of this appeal before the Court, which are specifically related to the scheduled oral argument. Id. The total amount of attorneys' fees, paralegal fees, and expenses for which Appellant seeks reimbursement for work done in the instant case is \$8,933.91.

WHEREFORE, based upon the foregoing, Appellant respectfully requests the Court award reasonable attorney's fees and expenses in the amount of \$8,933.91.

Respectfully Submitted,

May 7, 2019

/s/ Michael R. Viterna
Michael R. Viterna
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DECLARATION OF MICHAEL R. VITERNA

I, Michael R. Viterna make the following declaration in support of *Appellant's Application for An Award of Reasonable Attorney Fees and Other Expenses Pursuant to 28 U.S.C. §2412*.

I was the lead counsel for Appellant in the proceedings before the U.S. Court of Appeals for Veterans Claims and submit an itemized list of legal services and expenses incurred (see attachment 1) relative to the above captioned matter. This is summarized as follows:

I. The total amount of attorney's fees billed as lead counsel is 33 hours at \$190.88 per hour yields total fees for legal services of \$6,299.04. Please see the attached billing summary. Attorney and paralegal fees for Appellant's co-counsel are contained in Exhibit B.

II. No expenses are claimed by Appellant's lead counsel but are being claimed relative to expenses of the co-counsel. See Exhibit B.

III. The total amount of attorney's fees and expenses for which appellant seeks reimbursement for work done by Appellant's lead counsel in the U.S. Court of Appeals for Veterans Claims is \$6,299.04.

I certify under penalty of perjury that the information set forth in this Declaration is true and correct.

Respectfully submitted,

/s/ Michael R. Viterna
Michael R. Viterna
Attorney for Appellant
175 2nd Street
Belleville MI 48111
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175 2nd Street
Belleville MI 48111
Tax ID No. 27-2395101

Invoice

May 7, 2019

In Reference to: Natasha M. Thomas VA Matter

Date	Professional Legal Services	Hrs
11/3/2017	Telephone conference with Appellant regarding 10/23/2017 Board decision, review Board decision, draft letter transmitting forms and outlining merits of appeal	0.9
11/20/2017	Review forms received from Appellant, draft notice of appeal, notice of appearance and file with Court along with Declaration of Financial Hardship and retainer agreement	0.3
11/22/2017	Review Notice of Docketing	0.1
12/22/2017	Review Board decision filed to insure same decision appealed	0.1
2/7/2018	Review Court's notice for brief due	0.1
3/9/2018	Review Court's order for telephone briefing conference (TBC)	0.1
3/20/2018	Review Board decision and Record (R.) to page 1112, mark and make notes for summary	3.3
3/21/2018	Review R. pages 1113 to 2324, mark and make notes for summary	3.7
3/22/2018	Review R. pages 2325 to 4324, mark and make notes for summary (1.7 N/C)	1.7
3/23/2018	Draft summary template and statement of facts (0.9); begin draft of argument as to adequacy of Board's analysis, continue to expand and refine argument, conduct final review (3.1); draft email to CLS and GC transmitting summary of issues, draft Rule 33 certificate of service and file with Court (0.2)	4.2
4/9/2018	Draft letter to Appellant regarding TBC and next steps	0.2
4/6/2018	Review summary of issues and Record notes in preparation for TBC, participate in TBC, make notes for file (0.8); draft letter to Appellant regarding conference and next steps (0.2)	1.0
5/7/2018	Draft email to GC regarding extension of brief, draft motion and file with Court, review order approving extension (0.2)	N/C
6/4/2018	Review case summary, Record and TBC notes for preparation of brief, make outline of arguments to pursue (0.5); draft brief template, input case summary facts and arguments, draft statement of the case and issues, refine statement of facts (1.2);	2.4

	review in detail medical examinations and lay opinions relied upon by Board, incorporate into brief (0.7)	
6/5/2018	Begin drafting argument regarding subjective vs objective pain and probative value of lay evidence, conduct legal research on same (<i>Petitti v. McDonald</i> , 73 FR 54798, <i>Owens v. Brown</i>)	2.1
6/6/2018	Continue drafting argument regarding medical vs lay evidence and Board's analysis of evidence and adequacy of medical examinations (2.1); review draft, expand and refine, verify Record and legal citations used, file with Court (0.9)	3.0
6/7/2018	Draft letter to Appellant transmitting brief and outlining next steps	0.3
8/6/2018	Read and respond to email from GC regarding brief extension, review motion filed	0.1
8/7/2018	Review Court's order granting motion	0.1
10/2/2018	Review Appellee's brief, check case law cited, outline response (0.5); draft reply brief template and begin reasons or bases argument as to assessing lay evidence (1.6); draft argument as to the Board's reliance on medical examination results (1.5)	3.6
10/3/2018	Review arguments, refine and expand, review for final, check citations to law and Record, file with Court	1.7
10/4/2018	Draft letter to Appellant transmitting Appellee's brief and the reply, outline next steps	0.2
10/10/2018	Review Record of Proceedings	0.2
10/30/2018	Review notice of judge assignment, draft letter to Appellant regarding same and outlining next steps	0.2
12/27/2018	Review Court Order regarding assignment of case to panel, draft letter to Appellant regarding same	0.2
2/6/2019	Review Order for oral argument	0.1
2/25/2019	Draft letter to Appellant regarding additional of co-counsel for oral argument, transmit new retainer agreement	0.2
3/7/2019	Review correspondence from Appellant, file revised retainer agreement	0.1
4/9/2019	Read and respond to email from GC regarding possible JMPR, check file (0.2); consult with co-counsel on offer (N/C)	0.2
4/10/2019	Read and respond to email from GC regarding JMPR offer	0.1
4/12/2019	Telephone conference with Appellant regarding proposed motion to remand and possible outcomes of appeal	0.4
4/15/2019	Telephone conference with GC regarding JMPR, read and respond to email, review JMPR (0.2); draft email to co-counsel regarding actions (N/C); review notice of recusal (N/C)	0.2
4/23/2019	Exchange emails with co-counsel regarding status of oral argument (N/C); draft email to GC regarding status and review	0.2

	response (0.1); review per curiam order and mandate (0.1)	
4/24/2019	Draft letter to Appellant transmitting JMPR, Court Order and Mandate, outline next steps	0.3
5/7/2019	Draft EAJA application, review for final, file with Court, draft letter to Appellant transmitting application	1.4
	Total:	33.0

Expenses: \$ 0

Total fees and expenses for lead counsel: \$6,299.04